

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,)
)
Plaintiff,) Case No. CR 16-21
) Milwaukee, Wisconsin
vs.)
) September 5, 2018
SAMY M. HAMZEH,) 10:04 a.m.
)
Defendant.)

TRANSCRIPT OF IN COURT HEARING
BEFORE THE HONORABLE WILLIAM E. DUFFIN
UNITED STATES MAGISTRATE JUDGE

U.S. Official Transcriber: JOHN T. SCHINDHELM, RMR, CRR,
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1 TRANSCRIPT OF PROCEEDINGS

2 Transcribed From Audio Recording

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4 THE CLERK: [Indiscernible] Case No. 16-CR-21, in
5 court hearing [Indiscernible].

6 MR. TAIBLESON: Good morning, Your Honor. Benjamin
7 Taibleson and Adam Ptashkin for the United States.

8 THE COURT: Good morning to you both.

9 MR. ALBEE: Good morning, Your Honor. Craig Albee and
10 Joe Bugni on behalf of Samy Hamzeh.

11 THE COURT: Good morning, Mr. Albee, and good morning,
12 Mr. Bugni.

13 We're here for several matters that are kind of on the
14 table. At the last scheduling conference the government said --

15 Let me see the date of that. It was on August 2nd,
16 2018.

17 The government said it believed that the translation
18 of the 29 transcripts would be turned over to the government by
19 last Monday, August 27th, and then the government would review
20 them and be able to turn them over to the defense.

21 So let's start there. Where are we with the
22 transcripts?

23 MR. TAIBLESON: They were turned over to the defense
24 yesterday.

25 THE COURT: Okay. And let me ask Mr. Albee and

1 Mr. Bugni, what's next? I'm assuming the defense is going to
2 review the translations?

3 MR. ALBEE: Yes, Judge. We -- sometime yesterday
4 afternoon they were delivered to our office. Needless to say we
5 haven't looked at them in the slightest bit so -- and that'll
6 take some time.

7 The -- what we need to do is go through those
8 transcripts closely, compare them to the ones that we've had,
9 probably have Mr. Hamzeh and our translator listen to portions
10 of those transcripts to go through them and confirm their
11 accuracy, the accuracy of the speakers who are identified, make
12 sure that we know how each translation was recorded.

13 What we propose, Judge, is -- it's difficult to say.
14 I know Mr. Bugni will be largely doing this task. He has
15 several trials and -- he has three trials and five sentencing
16 in the next five or six weeks. So we'd ask for eight weeks to
17 review those transcripts.

18 Our real hope is at that point we'll -- our hope is
19 we'll be able to say we're stipulating to a whole bunch of
20 transcripts here and we only have a few disputes. I think eight
21 weeks is realistic.

22 As the Court knows, the government had up to eight
23 translators working over the last month on the transcripts in
24 this case and had been working on them since providing drafts
25 last November. So it is oftentimes more time consuming and

1 detailed than expected. We're not working with that kind of --
2 those kind of resources, but our hope would be to finish in two
3 months and if not, we'd have a really good handle on what kind
4 of tasks we still would need to do.

5 THE COURT: So what are you thinking, Mr. Albee? In
6 eight weeks you'll -- the defense will have gone through the
7 translations, or that the defense will have not only gone
8 through the translations but to the extent that there are any
9 disputes about any of the translations you'll have had a dialog
10 with the U.S. Attorney's Office to identify what is actually at
11 issue if anything?

12 MR. ALBEE: Our goal will be the latter. And we'll do
13 everything to get to that point. And again, my worry is given
14 how long it took the government -- I guess I always have worries
15 that it could take longer but that's --

16 THE COURT: How voluminous are these? Now that you
17 have them --

18 MR. ALBEE: 1600 pages?

19 MR. TAIBLESON: It's about 1200 transcript pages. So
20 the page measure is a little misleading because the number of
21 words on a page is, you know, not very great on many of these
22 pages. But, you know, it's fairly voluminous. It takes a
23 couple days to read them top to bottom.

24 THE COURT: Okay. Any objection to what he's
25 proposing from the government?

1 MR. TAIBLESON: No. No, if that's the -- we credit
2 the defense's position that's the amount of time it's going to
3 take them to do everything. I would like for the parties to be
4 able to eventually reach that stipulation by the eight-week
5 period.

6 THE COURT: I suspect you're not the only one. I know
7 Judge Pepper, before this case goes to trial -- I mean, ideally
8 what you'd like is to -- I think everybody would like to at
9 least know what we're -- what is at issue, if anything. I mean,
10 ideally everybody agrees that the translations are accurate and
11 that who is supposedly speaking is, in fact, the person who is
12 speaking and who the -- what the transcript says the person said
13 everybody agrees that that's what was said.

14 But if we can't get there prior to trial, then at
15 least what we'd like to know is -- I mean, is the trial going to
16 be spent with tedious disputes on a regular basis over every
17 translation or are there a handful of words or phrases that
18 people disagree what they mean. That's where we would like to
19 get.

20 MR. ALBEE: And, Judge, I believe that this is -- I
21 believe that this is a case where there should be only entirely
22 agreement. You know, once both sides can devote proper time to
23 this case, that we'll be in agreement. I don't think that it's
24 going to be a matter of a lot of fight over meaning. And the
25 Court's right, there could be a few words or a phrase here and

1 there, but we certainly don't want this to be dueling experts on
2 translations before the jury. And I think we do reach a point
3 where we're largely in agreement, we just want to make sure
4 before we stipulate to anything that we do have the right
5 speakers and everything's been translated.

6 THE COURT: All right. Well, let's keep an eye.
7 We'll -- at the end of this we'll look for a date roughly two
8 months out. We can reconvene to talk about where we're at with
9 the translations. So that's the -- that's that issue.

10 Issue no. 2. On July 13th, 2018, the defendant filed
11 an ex parte motion for a subpoena duces tecum under Rule 17(c).
12 And the defendant sought from the Milwaukee County Behavioral
13 Health Facility the medical records of a witness. I granted the
14 motion and issued the subpoena, but I ordered that the records
15 be provided to me for in-camera review.

16 I received those records and reviewed them, and
17 concluded that it was appropriate to disclose them in their
18 entirety to the defense to permit the defense to assess their
19 relevance, if any. But I also raise the question of whether it
20 was appropriate to disclose the records to the government as
21 well.

22 And before disclosing to either party I invited the
23 defense to provide its view on that issue, and the defense
24 responded that it has no objection to disclosing the records to
25 both the defense and the prosecution. So that's what I'm going

1 to do.

2 And here is a box of the records that I received from
3 Milwaukee County. I'm going to give those to the defense today,
4 now, and I'm going to instruct the defense to either scan or
5 copy those and provide them to the government. So I'll give
6 those to you at the conclusion of this.

7 All right, that's issue 2.

8 Issue or matter 3 relates to CIPA. The defense filed
9 something saying it wanted to respond to the government's filing
10 of August 8th, and I believe it said it needed -- it thought it
11 could do so by September 24th; is that correct?

12 MR. ALBEE: Correct, Your Honor. And I believe that
13 the government has indicated that it anticipates filing another
14 CIPA request --

15 THE COURT: Yes.

16 MR. ALBEE: -- some other material.

17 THE COURT: So that was going to be my next point was
18 related -- the defendants also filed a motion to compel. And
19 according to the motion, the defense has discussed the matter
20 with the government and the government indicates that it's going
21 to be responding under CIPA. Is that correct, Mr. Taibeson?

22 MR. TAIBLESON: That is correct. We withdrew nearly
23 every discovery dispute that was the subject of a previous
24 hearing, with the exception of a few things that the government
25 believes will be covered by this CIPA motion. Those were the

1 subject of the defense's motion to compel.

2 And the defense indicated there would be a couple
3 other varieties of discovery it was going to seek a motion to
4 compel on. The government expects that we'll respond under the
5 Classified Information Procedures Act to those requests too.
6 And so we do expect to file an additional CIPA motion.

7 And for purposes of efficiency would ask that should
8 this court ultimately schedule a hearing for the second CIPA
9 motion, that it consolidate both those CIPA hearings into one.

10 THE COURT: Yeah, that makes sense to me and I think
11 that's what I was planning on doing. So if the defense is
12 responding to the first CIPA motion by September 24th, will the
13 government be in a position to respond to the motion to compel
14 by September 24th?

15 MR. TAIBLESON: Yes, I think so.

16 THE COURT: So we'll set that as the deadline for both
17 responses to both issues. Both motions. So just to be clear,
18 September 24th will be the defendant -- the deadline for the
19 defendants to respond to the government's August 8th filing, and
20 September 24th will also be the government's -- the deadline for
21 the government to respond to the defendant's most recent motion
22 to compel.

23 And then we will probably at that point schedule a
24 hearing -- we could do it today, but I think we'll probably need
25 the classified information security officer's schedule to be

1 able to schedule that so -- but I think that it makes sense to
2 do it all at one time.

3 Anything else on that issue?

4 MR. ALBEE: Judge, two things. First of all, I think
5 as Mr. Taibleson was suggesting, we've talked through most of
6 the remaining discovery issues from the Court's July I think
7 25th order, and there will be -- there will be a few things that
8 we'll need to file another discovery motion on which we hope to
9 do by the end of next week. So we're trying to sort out the
10 last remaining things with the government, but we will be filing
11 another motion to compel as to a few scattered things.

12 And then next on the CIPA issue, while we'll file our
13 memorandum on -- by September 24th explaining why we think we
14 should be entitled to these materials, we would request the
15 opportunity for some oral argument on that issue.

16 THE COURT: Yeah, I agree, and I will accommodate
17 that. My thought is that perhaps we'll have one hearing with
18 the defense present for the first part to offer its thoughts on
19 the CIPA, and then after the defense leaves we'll just proceed
20 directly with the CIPA hearing.

21 MR. ALBEE: Okay.

22 THE COURT: So we'll schedule that after we get
23 everything filed.

24 And next is the spoliation motion. Does it make sense
25 to schedule that -- wait until we have the CIPA hearing to

1 schedule that? Will the CIPA hearing possibly moot some of the
2 issues raised by the spoliation motion?

3 MR. ALBEE: I wouldn't think that it would moot any of
4 those issues. I know the Court had ordered a number of things
5 relating to the texts. I haven't seen the government
6 responding -- the government thinks its responded to those
7 requests, but as we've pointed out in previous pleadings we
8 don't think that there's been a satisfactory response which is
9 the need for the hearing.

10 I think we need a hearing on: What the nature of the
11 texts were; why they weren't preserved; what efforts were made
12 at preserving them; what efforts have been made to recreate
13 them; whether there are any rough notes summarizing what could
14 be in texts; any efforts to recover texts from CI phones; what
15 instructions were given to the CIs.

16 So, I mean, there are a number of things to deal with
17 at the spoliation hearing that I think would not be mooted by
18 anything that would happen with respect to CIPA.

19 THE COURT: At the spoliation hearing I'm wondering
20 whether it makes sense to just do that all at the same time if
21 we're having oral argument on the CIPA issue, whether we roll
22 the spoliation hearing in part of that discussion as well,
23 followed by the CIPA hearing with just the government.

24 MR. TAIBLESON: That's fine with the government.

25 MR. ALBEE: I wouldn't have any problem with that, but

1 I do think that the spoliation hearing will be maybe somewhat
2 lengthy.

3 THE COURT: Meaning what? What's your best estimate?

4 MR. ALBEE: Well, I mean we're planning on suggesting
5 a morning or afternoon and hoping it could get done in that
6 period of time.

7 One thing in connection with the spoliation hearing
8 that we would ask the Court to require of the government is
9 we've been told simply that there were some -- I think the words
10 were a "software glitch" that prevented the government from
11 recovering texts, but we haven't gotten any information as to
12 what the nature of that problem was.

13 So we would ask that the government be required to
14 present somebody with knowledge as to why it couldn't be
15 recovered and what efforts were made to recover it from the FBI
16 servers, and that we get identification of who that person is --
17 who that witness would be and a summary of their testimony two
18 weeks before a hearing so that we'd be in a position to respond
19 with our own expert testimony if needed.

20 THE COURT: Okay. Any objection to that,
21 Mr. Taibleson?

22 MR. TAIBLESON: No.

23 THE COURT: At the end of the day, though, what I'm
24 hearing from the defense is we're ready to schedule the
25 spoliation hearing. I mean, there's nothing that would prevent

1 us from scheduling that right now.

2 MR. ALBEE: I think that's right.

3 THE COURT: All right. So we'll -- I'll think about
4 that and we'll get you a date for the spoliation hearing and the
5 CIPA hearing.

6 What else has to be done to get this ready for trial?

7 MR. TAIBLESON: I think we've made a lot of progress,
8 candidly, in the last month. The discovery issues were
9 substantial, but I think mostly resolved -- are now mostly
10 resolved and I have no reason to think we're not working
11 together pretty well that we can't get them entirely resolved
12 quickly. The defense has the transcripts that we have had
13 prepared. I guess within eight weeks hopefully we can come to
14 some stipulation with regard those transcripts.

15 The government is waiting now on the defense
16 transcripts to the extent there are any additional ones. So
17 once we have those obviously we'll have to review them and
18 hopefully we can come to some sort of stipulation maybe by that
19 same eight-week deadline.

20 The government's also made reciprocal discovery
21 requests of the defense. I expect us to hopefully be able to
22 work through those. But in my view at least, that's about it.
23 And then the spoliation issue, obviously.

24 THE COURT: Okay.

25 MR. ALBEE: I think -- I largely agree with that. I

1 think if the issues in the pending motions and the other motions
2 to compel and probably some particular concerns with respect to
3 whether there are intercepted communications, GPS, those kind of
4 things, if the government did indeed intercept communications as
5 they did or if they have GPS or other kinds of surveillance
6 activities, I don't know what kind of volume would be there. I
7 think that those things should be produced.

8 It would be our view that all of that would be
9 exculpatory. We presume it would have been turned over if it
10 was incriminating to Mr. Hamzeh. And any surveillance that
11 doesn't uncover any illicit activities by him during this period
12 of time is exculpatory to us. It shows he's not in
13 communications with terrorist organizations; that he's not doing
14 things on his own; that this is entirely generated by the
15 confidential informants in the case.

16 So I guess that's one thing that we think is
17 potentially significant. But, of course, we don't know what the
18 scope -- the scope might be.

19 A minor -- a relatively minor thing, Judge. I'll just
20 raise it here in case we can settle it on the record. If not,
21 we'll just file a written request.

22 At the time of -- or shortly after Mr. Hamzeh's arrest
23 his home was searched. The government seized I think three
24 electronic devices, a MacBook, a PlayStation, and a cell phone.
25 And as the Court knows, there can be a significant volume of

1 material on these kind of electronic devices. We would just ask
2 that the government give us 45 days' notice of anything it
3 intends to use from those devices.

4 I mean, it's needle-in-a-haystack kind of thing. So
5 if the government intends to, you know, whether it be a text or
6 whatever it is that they find on the -- that they might intend
7 to use, we'd just like 45-day notice.

8 The other thing is a couple weeks ago we received I
9 think several hundred hours -- I'm not sure of the exact
10 amount -- of pole camera footage. And we would like 45 days'
11 notice if the government intends to use anything from those
12 several hundred hours of pole cam.

13 Again, we can't possibly go through it and scrutinize
14 it and decide what the government might use. It truly is a
15 needle in the haystack. So we don't think that's a particularly
16 onerous requirement. We'd ask for 45 days' notice of its intent
17 to use anything from seized electronic devices or from the pole
18 cams.

19 THE COURT: Mr. Taibleton?

20 MR. TAIBLESON: The government intends to produce an
21 exhibit list when ordered by the court. Because this is a
22 Judge Pepper case, that's going to be substantially before
23 trial. If the defense believes there is some authority
24 supporting the idea that they should get our exhibits 45 days
25 ahead of trial, maybe the best approach would be for them to

1 submit a written filing and citing that authority because the
2 government is aware of none.

3 THE COURT: There you go, Mr. Albee.

4 MR. ALBEE: I guess I'll file a motion. I know
5 Judge Pepper's frequently done it so -- thank you.

6 THE COURT: Okay. Anything else?

7 MR. ALBEE: No, Your Honor.

8 THE COURT: All right. Let me make a speedy trial
9 finding.

10 The Court's satisfied that this case is so unusual and
11 complex due to the nature of the charges being prosecuted that
12 it's unreasonable to expect adequate preparation for pretrial
13 proceedings and for the trial itself within the time limits
14 established by 18 U.S.C. § 3161, such that the ends of the
15 justice served by taking such action outweigh the best interests
16 of the public and the defendant in the speedy trial.

17 Therefore, the time from today until blank -- we need
18 to pick the blank -- how about we'll want to pick another date
19 roughly two months out, how about Tuesday, November 6th at 10:00
20 a.m.?

21 MR. TAIBLESON: That works for the government.

22 MR. ALBEE: Yeah, that's fine.

23 THE COURT: All right. From today until on November
24 6th, 2018 is excluded under the Speedy Trial Act, under
25 18 U.S.C. § 3161(h)(7)(B)(ii).

1 All right. That's it. And we'll get you, Mr. Bugni,
2 the documents.

3 (Proceedings concluded at 10:26 a.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified December 19, 2018.

/s/John T. Schindhelm

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